Supreme Court of the United States

OCTOBER TERM, 1933

No.....

CONRAD WOLFLE, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles E. Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

S. J. WETTRICK,
WETTRICK, WETTRICK & FLOOD,
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To the Honorable Charles E. Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

PRAYER.

The petitioner, Conrad Wolfle, prays that a Writ of Certiorari issue to review the decree entered on April 8, 1933, by the United States Circuit Court of Appeals for the Ninth Circuit (R. 139), after which a petition for rehearing was denied on June 19, 1933, in the above entitled cause.

DECREE BELOW.

Such decree of the United States Circuit Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the Western District of Washington, Northern Division, and the verdict of the jury finding defendant guilty on four counts of the indictment.

QUESTION PRESENTED.

Whether the contents of a letter written by a husband to his wife taken down in shorthand by a stenographer in the employ of the husband are privileged.

SUMMARY OF FACTS.

This was a criminal prosecution of the defendant Conrad Wolfle for alleged violation of Section 215 P. C. forbidding the use of the mails to defraud. The indictment contains six counts. It sets forth an alleged scheme to defraud by organizing a corporation under the laws of Alaska, known as the Cantu Mining Company, and the sale of stock in said company by means of newspaper and circular advertising and correspondence, and by personal misrepresentation by said defendant and his agents, each charge being based on a specific letter sent through the mail. Count V was dismissed. The jury returned a verdict of not guilty as to Count VI.

On the trial of the cause the trial judge, over the objection of defendant's counsel, received the testimony of the witness, Grace Snyder, the appellant's private stenographer, who was permitted to prove the contents of a letter from appellant to his wife. This was a private confidential letter from appellant in Seattle to his wife at Spokane, dictated to his stenographer, who read this undated letter into evidence from her stenographic notebook which she surreptitiously abstracted from her employer's office during appellant's absence.

In this letter after telling his wife the earnest satisfaction he obtained from the report that his little daughter, Virginia, was on a school program in Spokane, and that he was proud of her, and further speaking of the result of his examination by a doctor and the fact that the doctor told him that he should leave his business for awhile and take a long rest, he stated, "I talked to a banker the other day, he said 'You have done as much as most people do in two years. Its hard to break in;' but I am going to break in, and whenever I do, I am going to rob every last one of them blind. You bet your last bottom dollar, as ever,"

RULINGS OF THE LOWER COURT.

Upon the trial of this action before a jury, the prosecution sought to introduce in evidence a con-

fidential letter written by the defendant, Conrad Wolfle, to his wife, above quoted.

This testimony offered by the witness Grace Snyder, stenographer and secretary for Mr. Wolfle, was seasonably objected to, but the trial judge overruled the defendant's objection and allowed the testimony pertaining to the letter and the reading of it from the stenographic notes to be placed before the jury.

Over the objection of the defense the jury was allowed to hear evidence damaging to the defendant which they had not by law a right to consider.

RULING OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals affirmed the decision of the lower court, overruling defendant's objection to the evidence offered by the plaintiff holding that the contents of a confidential communication between husband and wife could be testified to by a third person coming into possession of the same.

The Circuit Court of Appeals in its decision assumes that the testimony concerned an oral communication for the reason that the husband dictated the letter to the stenographer who then testified

concerning the same on the stand. However, the fact is that the stenographer did not testify from memory but read her stenographic notes which she surreptitiously took from the possession of the defendant.

REASONS FOR GRANTING WRIT.

1. The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the decisions of the State of Washington, the jurisdiction in which this case was tried. In reference to the privilege concerning confidential communication between husband and wife, the decision of the Circuit Court of Appeals tends to confuse the law on this subject by rendering almost a nullity the established rules of evidence concerning private relations between husband and wife.

2. The decision rendered in the District Court and the Circuit Court are in conflict with other decisions on the same subject in different Circuits, rendering federal law on this subject, confused and in non-accord.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the court below, commanding that court to certify and to send to this court for its review and deter-

mination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 7007, CONRAD WOLFLE, Appellant vs. UNITED STATES OF AMERICA, Appellee, and that the said decree (or judgment) of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

S. J. WETTRICK,

Attorney for Petitioner.

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
COUNTY OF KING. } ss.

S. J. WETTRICK, being first duly sworn, on oath deposes and says:

That he is an attorney at law, admitted to practice before the Supreme Court of the United States; that he is one of the attorneys for the Petitioner in the above entitled cause; that the foregoing petition was prepared in good faith and not for delay; that this Petition in his opinion is meritorious and well founded in law; that he has read said Petition, knows the contents thereof, and believes the same to be true.

S. J. WETTRICK,

SUBSCRIBED and SWORN to before me this 4th day of August, 1933.

F. J. WETTRICK,
Notary Public in and for the State of of Washington, residing at Seattle.

WETTRICK, WETTRICK & FLOOD,
H. SYLVESTER GARVIN,
Of Counsel,
Attorneys for Petitioner.
Arctic Building
Seattle, Washington.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No.....

CONRAD WOLFLE, Petitioner,

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UNITED STATES OF AMERICA, Respondent.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The decision of the District Court overruling the petitioner's objection allowed the respondent to introduce evidence by a third party concerning a confidential communication between husband and wife. This testimony was so damaging that it had a great and controlling influence upon the verdict of the jury in this action. The jury found the petitioner guilty under the mail fraud statute on four counts; Count V was dismissed, and the jury found petitioner not guilty on Count VI.

The opinion of the Circuit Court of Appeals, San Francisco, Judges Wilbur, Sawtelle and Mack, was written by Judge Wilbur, filed April 8, 1933, R. 139), not yet reported.

Petition for rehearing was denied on June 19, 1933. The primary question considered in the decision of the Circuit Court of Appeals was whether or not a third person could testify concerning a confidential communication between husband and wife. This decision, however, was based upon the assumption of the court that the communication was oral and not written.

Jurisdiction of this court is invoked under Judicial Code, section 240(a) as amended by the Act of February 13, 1925, Ch. 229 (43 Stat. 938; 28 U. S. C. A., section 347).

The decree of the Circuit Court of Appeals to be reviewed was entered April 8, 1933 (R. 139).

Petition for rehearing was denied June 19, 1933.

Facts.

The facts are sufficiently reviewed in the petition. The question involved herein is a matter of law, and the decision of the Circuit Court of Appeals leaves but one question to be determined by this court.

Question Presented.

Whether statements in a letter written by a husband to his wife, taken down in shorthand by a

stenographer in the employ of the husband, are privileged. Or put in another form, does either spouse lose the right to claim the privilege attaching to a communication between husband and wife, where the communication is dictated to a stenographer and reduced to writing by her?

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUTS.

Courts of other circuits have sustained the contention of petitioner by holding that the privilege pertaining to communications between husband and wife extends to evidence in the possession of third persons.

In *New York Life Insurance Co. vs. Ross*, 30 Fed. (2d) 80 (C. C. A. 6th, 1928) certiorari denied—49 S. Ct. 348, a recent case, it was held that a letter addressed by a husband to his wife and found with his will could not be introduced in evidence by the defendant in an action on behalf of the wife on a policy of life insurance.

This is also the effect of *Bowman vs. Patrick*, 32 Fed. 368 (Cir. Ct. E. D. Missouri E. D., 1887), where the administrator of the estate of the wife found letters from the husband in the papers of the deceased and in a spirit of hostility turned them over to an adverse party in a lawsuit against the husband, the court held such letters inadmissible.

Privilege Recognized in Case of Attorney and Client.

Our contention is also sustained in *Liggett vs. Glenn*, 51 Fed. 381 (C. C. A. 8th, 1892); a case involving a communication between client and attorney; at pages 396-397, Judge Shiras declared:

> "The admissibility of the communication, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be put in evidence was made by reason of the confidential relationship existing between client and counsel, it becomes a privileged communication, and as such it is not competent evidence against the party. Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. It will not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which do not involve the counsel in a breach of professional duty. For illustration, a letter is written by a client to his attorney containing statements of a privileged nature. His counsel, having this letter on his person, meets with an accident, causing his death. Third parties in this way become possessed of the letter and from them it passes to the possession of the adverse party. Has this letter lost its privileged character and become competent evidence against the writer simply because it passed

from the possession of his counsel, to whom it was written, without fault on the part of the attorney? Suppose that, upon the trial of a cause, an attorney is sworn as witness and he is asked to produce a letter written him by his client. He refuses on the ground that it is confidential communication. The trial court overrules the objection and compels the production of the letter, which is filed as part of the evidence in the cause. Appellate court reverses the ruling of the trial court on this question, holding that the letter was privileged and sends the case back for a new trial. On the second hearing the attorney is not called as a witness but the clerk, in whose custody the letter was placed on the first trial, was summoned by a subpoena *duces tecum*, and required to produce the letter in order that the same may be read in evidence. It is possible that this letter, being a confidential communication between client and counsel, can be rightfully put in evidence upon the theory that the possession thereof was obtained without fault on the part of the attorney. The argument, founded upon the assumption that the admissibility of confidential communications between client and counsel is dependent solely upon considerations of the duty of counsel not to make known that which was communicated to him professionally, is, in our judgment, faulty, in that it ignores the main purpose of the rule, which is that the client shall be at liberty to freely communicate to his attorney knowledge of all matters connected with the business in hand upon the assurance that confidential communications thus made are privileged and cannot be used in evidence against him unless he deprives them of their privileged character."

Also:

Insurance Co. vs. Schaffer, 1876, 94 U. S. 457.

Similarly a husband should be able to communicate with his wife, secure in the principle that the communication is inviolate.

COMMUNICATION OF PATIENT TO PHYSICIAN PRIVILEGED.

Likewise, the law, solicitous of the welfare of the patient, grants the physician the right to avail himself of all the modern developments and improvements in the field of surgery and medicine, without relaxing the privilege. The physician may employ a trained nurse as his assistant, a bacteriologist, a technician, or a hospital recorder for the purpose of keeping records, and yet in doing so the law would not tolerate the suggestion that the physician thereby destroys the privilege thrown around communications between patient and physician.

In *Toole vs. Franklin Investment Co.* (Wash. 1930), 291 Pac. 1101, the state court permitted hospital records to be introduced in evidence against the defendant. This was, however, pronounced error by the Supreme Court, on the ground that it contravened the policy of the privilege.

See also *Culver vs. U. P. Ry.* (Nebr. 1924), 199 N. W. 794.

The privilege here in question is equally as important as privilege between attorney and client and physician and patient. Undoubtedly the policy be-

kind it is much more important and sacred than either of the other two. The communication would have been clearly privileged in either of the other two cases, regardless of dictation to a stenographer. To dissolve the privilege here would be to stultify the reasoning and purpose of the law and to confess that the law and the courts are inadequate to adapt themselves to public policy in the face of changing conditions and modern developments, and no infidelity of a stenographer should serve to make this letter an instrument of evidence.

Circuit Court's Decision Misapplies the Law of Local Forum.

The cases cited in the Circuit Court's opinion do not, it is respectfully submitted, sanction the abrogation of the privilege where the husband communicates with his wife through the medium of a stenographer.

The leading case cited in support of its decision is that of *Sate vs. Nelson*, 39 Wash. 221. The opinion in that case was written by the late Justice Rudkin, then a member of the Supreme Court of Washington. The facts of the case at bar are entirely foreign to those in the *Nelson* case, and no analogy is to be found in the two cases. The letter in question in the case at bar, was one by the defendant Wolfle to his wife, the contents of which were proven by the

shorthand notes of his stenographer. The letter in the *Nelson* case was not one written by Nelson to his wife, but on the contrary, was one written by a certain Paulina Smith, witness who had testified for the defendant Nelson. The letter was apparently released to the State by the husband of the witness, who was estranged from his wife at the time of the trial and when the letter was written. Hence the letter was clearly and properly available for impeaching purposes, and it is important that it was offered only for that purpose. Of course, the claim of privilege here would fail. Privilege no longer applies when estrangement has taken place. Moreover, the husband himself had dissolved the privilege. No such facts exist in the case at bar.

Nor does *State vs. Falsetta*, 43 Wash. 159, support the conclusion of the Circuit Court. It was not a communication of husband to wife, but was a statement made in open court by the defendant to his attorney in the presence and hearing of an officer of the law. Certainly there is no question of privilege here and the case has no relation whatever to the facts of the *Wolfle* case.

Nor does *State vs. Rasmussen*, 125 Wash. 176, lend support to the principle that dictation to a stenographer dissolves a privilege otherwise attaching. It cites the *Nelson* case, *supra*, as its authority. The *Nelson* case involves a wholly different state of

facts than the *Wolfle* case, and can be no authority for the decision of the Circuit Court.

Nor are the cases cited in the opinion from other states in harmony with the rule that the privilege is lost, by reason of dictation to a stenographer. The case of *Oregon vs. Wilkins*, 72 Ore. 77, so much relied on, involved a letter written by the defendant to his *aunt!* This would give rise to no claim of privilege. There was also a communication from the wife to the husband, which was received in evidence: but the husband and wife were then estranged, and her letter was a self-serving attempt to exculpate herself from suspicion of misconduct. Again there is absent any similarity or identity of facts, to apply that case to the situation in the *Wolfle* case.

The California cases cited, when analyzed, are equally as remote, in their facts and governing principles, as the Washington-Oregon cases heretofore discussed.

The Circuit Court in its opinion omitted mention of such excellently reasoned cases as *Ward vs. State* (Ark.), 66 S. W. 926; *Gross vs. State* (Tex.), 135 S. W. 373; *Regina vs. Lehman*, 11 Cox C. C., 152; *Regina vs. Parmenter*, 12 Cox C. C. 177. These cases apply the correct principle, for the purpose of enforcing the policy of protecting the sanctity of family life.

DICTATION TO STENOGRAPHER NOT "PUBLICATION."

The law of defamation furnishes an excellent illustration of the tendency of the law to adjust itself to the progress of the business and commercial world. Under the earlier cases a generation or two ago, when stenographers and typists first came to the attention of the law, the tendency was to adopt the view that dictation to a clerk, stenographer or typist was a "publication" such as would render the communication libelous.

Lord Esher, in *Pullman vs. Hill*, 1 Q. B. 524.

But the widespread and universal adoption of the practice of dictation to stenographers and clerks rather than communicating by the ancient manual method of using quill and pen, lead the courts to harmonize their decisions with modern commercial necessity. In the later cases therefore we find that communications dictated to a stenographer in the ordinary course of business duty are privileged.

Baxius vs. Goblet Freres, 1894 1 Q. B. 842, 2 Reports 224, 7 L. T. N. S. 638.

Edmonson vs. Birch, 1 K. B. 371; 1 B. R. C. 444.

Morgan vs. Moss, 33 L. T. R. 495 (1917).

Cartwright vs. Fishel (1917) Miss., 74 So. 278.

Owens vs. Ogilvie, 53 N. Y. S. 1033.

Central vs. Jones, Ga., 89 S. E. 429.

Glove vs. Wright, 265 Fed. 873 (Sup. Ct. D. C.).

DECISION OF CIRCUIT COURT NOT IN HARMONY.

The trend of the law is—and should be—forward looking. Wheels of progress can not be turned backward. Manual methods of conducting correspondence are gone forever. The law is not helpless to adjust itself to mechanical and commercial advancements. This court has always shown itself vigilant in conserving social and political gains which have marked the course of progress throughout the last generation. Principles of establishing maximum and minimum wage standards have been harmonized with the legalistic concept of the liberty of contract. Similarly as to zoning ordinances, workmen's compensation acts, and many other such modern innovations.

The protection of family life is equally as important today as it was hundreds of years ago when the privilege was first accorded to marital confidences and communications. It is a worthy objective to protect this privilege under modern commercial practices, and to encourage and preserve inviolate the intimate and free exchange of confidences between husband and wife. Healthy family life depends upon it. Sound public welfare in turn depends upon wholesome marital felicity. No artifice or innovation such as dictation to a stenographer should be permitted to undermine the structure of the law. Nor should any temporary expediency in

the course of a departmental prosecution for mail fraud, tempt our courts to destroy or abrogate a principle vital to public welfare.

Upon these considerations, the matter is submitted with the prayer that the decisions of the district and circuit courts be reversed.

Respectfully submitted,

S. J. WETTRICK,

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Attorneys for Petitioner.